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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY ALLEN POLLOCK,

Defendant and Appellant.

E055137

(Super.Ct.No. FSB1004611)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kenneth Barr,
Judge. Affirmed.

Patrick J. Hennessey, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and Kristine A.
Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Gregory Allen Pollock, pled no contest to possessing cocaine base for
sale and the trial court sentenced him, as agreed, to the low term of three years in prison

after striking a “strike.” Defendant argues the case should be remanded for re-sentencing because the trial court should have sentenced him to serve his time in county jail, rather than state prison, under recent legislation known as the Realignment Act. As discussed below, the very fact that defendant had a prior “strike” conviction, even if stricken for sentencing purposes, made him ineligible to serve his time in county jail under the Realignment Act.

FACTS AND PROCEDURE

On October 20, 2010, police officers executing a search warrant at a residence found methamphetamine, cocaine base, a digital scale and packaging materials in a bedroom that defendant occupied.

On November 3, 2010, the People filed a complaint charging defendant with possessing methamphetamine for sale (Health & Saf. Code, § 11378) and possessing cocaine base for sale (Health & Saf. Code, § 11351.5) and alleging that he had a prior strike conviction (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)).¹

On January 14, 2011, defendant pled no contest to the cocaine base charge. He was to return to court for sentencing on March 18, 2011, at which time he would be sentenced to the low term of three years in prison at half time. Under the *Cruz*² waiver, defendant would be released immediately, but if he failed to appear for sentencing or

¹ All section references are to the Penal Code unless otherwise indicated.

² *People v. Cruz* (1988) 44 Cal.3d 1247.

committed any new crimes, he would receive the maximum sentence of five years at half time.

After several continuances at defendant's request, defendant failed to appear at his October 21, 2011 sentencing hearing. At his actual sentencing hearing on October 26, 2011, defendant admitted violating the *Cruz* waiver and waived 17 days of custody credits in exchange for receiving the three-year sentence originally contemplated. Defense counsel and the trial court discussed whether defendant should be committed to state prison or county jail. The court relied on section 1170, subdivision (h)(3), to commit defendant to state prison, reasoning that the statute disqualifies from county jail any defendant who has a serious or violent felony prior conviction. Defense counsel objected, arguing that any disqualifying prior convictions would have to be pled and proven, whereas defendant's strike prior had been dismissed without having been pled or proven. The trial court then explained that, based on its research into the Realignment Act, it concluded that the disqualifying prior need not be pled and proven. The court remanded defendant to state prison to serve his three-year term. This appeal followed.

DISCUSSION

The question here is whether the Criminal Justice Realignment Act of 2011 (hereafter Realignment Act) (Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 12, § 1; § 1170, subd. (h)), which “[r]ealign[ed] low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs” (§ 17.5, subd. (a)(5)), required the trial court to order defendant's sentence to be served in county jail after it dismissed his strike prior pursuant to section

1385.³ We conclude that a trial court sentencing a defendant under the Realignment Act in fact has no discretion to allow a defendant with a prior strike conviction to serve his sentence in county jail, even when the trial court has dismissed the strike under section 1385. This is because, under *People v. Lara* (2012) 54 Cal.4th 896 (*Lara*), which resolved a similar issue, a trial court is empowered under section 1385 to strike only the individual charges and allegations in a criminal action, not the historical fact of prior strike convictions.

As amended by the Realignment Act, the pertinent portion of section 1170, subdivision (h), now provides as follows:

“(2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense.

(3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior . . . felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior . . . conviction for a violent felony described in subdivision (c) of Section 667.5, . . . an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.”

Defendant argues the trial court retained discretion to determine whether the strike prior should be taken into account or disregarded in the exercise of its sentencing options. However, defendant also acknowledged that the California Supreme Court had before it, in *Lara*, the similar issue of whether the trial court retains discretion, after dismissing a

³ Section 1385 provides in part: “(a) The judge or magistrate may . . . order an action to be dismissed. . . . [¶] . . . [¶] (c)(1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).”

prior strike conviction under section 1385, to ignore the prior strike conviction to make the defendant eligible for additional presentence credits under section 4019. Section 1170, subdivision (h), like section 4019 in *Lara*, provides that any defendant with one or more prior strike convictions is ineligible to benefit from its provisions.

On July 19, 2012, the California Supreme Court issued its opinion in *Lara*, which we find to be extremely persuasive in the present case. The Court held that, with regard to increased presentence custody credits made available to defendants without prior strike convictions under section 4019, a trial court’s dismissal of a prior strike under section 1385 “reaches only the ‘individual charges and allegations in a criminal action.’ [Citation].” (*Lara, supra*, 54 Cal.4th at p. 901.) “The historical facts that limit a defendant’s ability to earn conduct credits do not form part of the charges and allegations in a criminal action.” (*Ibid.*) For similar reasons, these same historical facts—a prior strike conviction—that limit a defendant’s eligibility to serve his or her sentence in county jail also do not form part of the charges and allegations in a criminal action. Thus, under the Realignment Act, a trial court may not ignore the fact of a prior strike conviction, though dismissed under section 1385, when determining whether a defendant is eligible to serve his sentence in county jail under section 1170, subdivision (h), for the same reason the court may not ignore this fact for purposes of awarding custody credits under section 4019, as set forth in *Lara*.

DISPOSITION

The judgment of conviction and the sentence imposed are affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.